

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.06.2018

CORAM:

THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MR.JUSTICE SUBRAMONIUM PRASAD

W.P.No.13236 of 2018
and
WMP No.15590 of 2018

1. P.R.Annamalai
2. A.Nachiammai Petitioners

vs.

1. The Authorised Officer,
Indian Bank,
Erukkancherry Branch,
Chennai - 600 118.

2. The Presiding Officer,
Debts Recovery Tribunal-III, Chennai,
5th Floor, Spencer Tower,
770A, Anna Salai,
Chennai - 600 002. Respondents

WRIT Petition filed under Article 226 of the Constitution of India, praying for the issuance of a writ of Certiorarified Mandamus, calling for the records in OA 48 of 2009 on the files of the Hon'ble DRT III, Chennai or any other order in the form of writ and i) quash the order 27.9.2017 passed in OA No.48 of 2009 on the file of the presiding Officer of Debts Recovery Tribunal-III, Chennai and ii) Consequently direct the Presiding Officer of Debts Recovery Tribunal III, Chennai to recall the Debts Recovery Certificate No.21 of 2018 dated 01.2.2018 in O.A.No.48 of 2009, issued by him on his file.

For Petitioners : Mr.R.Subramanian

For Respondents : Mr.B.Murugavel (for R1)

ORDER

(Order of the Court was made by S.MANIKUMAR, J)

M/s.Murugan Foundary (P) Limited, a small scale unit,
incorporated under the Companies Act, borrowed loan from Indian

Bank, Erukkenchery Branch, Chennai. Part of the loan amount was paid and that there was default. Account was classified as NPA. Bank issued, possession notice dated 10.08.2007. M/s.Murugan Foundary (P) Limited, represented by its Managing Director, Smt.A.Nachammai, and P.R.Annamalai joined as applicants and filed SA No.151 of 2007, before Debts Recovery Tribunal-III, Chennai, to quash the said possession notice. After hearing the learned counsel for the parties, vide order dated 12.09.2012, Debts Recovery Tribunal-III, Chennai, set aside the possession notice, allowing S.A. No.151 of 2007.

2. Bank has filed OA No.48 of 2009 against M/s.Murugan Foundary (P) Limited, represented by its Managing Director and five others, for the following reliefs:

(i) directing the defendants 1 to 5, jointly and severally, personally to pay the entire amount of Rs.66,31,579.30p together with 18.36% per annum with quarterly rests from the date of application till the date of realization;

(ii) To issue a Recovery Certificate against the defendants 1 to 5 to pay the applicant jointly and severally a sum of Rs.66,31,579.30p being the amount due under the above loan account together with interest thereon at the rate of 18.36% per annum from the date of application till the date of payment in full with quarterly rests;

(iii) to pass an order for sale of mortgaged immovable properties more fully described in the item one and item two of the Schedule 'A' to an in favour of the applicant and the proceeds of the sale of schedule 'A' property to be appropriated towards the amounts due, after defraying the expenses for sale;

(iv) To pass an order for sale of hypothecated assets morefully described in the schedule 'B' hereunder to and in favour of the applicant and the proceeds of the sale of schedule 'B' property to be appropriated towards the amounts due, after defraying the expenses for sale;

(v) To pass a personal decree against the defendants 1 to 5 in case of the proceeds of sale are insufficient, for the payment of balance dues with future interest at 18.36% per annum with quarterly rests till date of payment.

(vi) to direct the defendants to pay the applicant the costs of this application"

3. Record of proceedings dated 27.09.2017 in OA No.48 of 2009 on the file of Debts Recovery Tribunal-III, Chennai, shows that written submissions, were not filed in time and therefore on 07.09.2017, the Debts Recovery Tribunal-III, Chennai, directed the defendants to file written submissions on payment of cost of Rs.1,000/- to "Ramakrishna Mission Students' Home".

Said order was not complied with. Written submission was not filed. Hence on 27.09.2017, when OA No.48 of 2009, came up for further hearing, Debts Recovery Tribunal-III, Chennai set the defendants exparte and allowed the OA No.48 of 2009, in terms of the prayer made by the bank. For brevity, proceedings dated 27.09.2017 is extracted hereunder.

"Both sides are present. Written submissions filed on behalf of the applicant bank. Copy served on the other side. Ld. counsel for the defendants submitted that although they contemplated to file written submissions on behalf of the defendants, same was not filed on the surmise that since they moved transfer application before the Hon'ble DRAT for transfer of this OA to any other Tribunal, the orders of this Tribunal on 07.09.2017 directing them to file written submissions on payment of costs Rs.1,000/- to "Ramakrishna Mission Students' Home" was without jurisdiction and so was not complied. As the interim direction was not complied nor written submissions furnished on behalf of the defendants, defendants are called absent and set ex-parte.

OA is allowed in terms of the prayer made by the applicant bank."

4. Consequent to allowing OA No.48 of 2009, Debts Recovery Certificate has been issued in DRC No.21 of 2018 in OA No.48 of 2009, on the file of Debts Recovery Tribunal-III, Chennai, under sub-Sections 7 and 22 of Section 19 of the Recovery of Debts Due to Bank and Financial Institutions Act, 1993 for Rs.3,34,63,125.70p.

RECOVERY CERTIFICATE FOR RS.3,34,63,125.70P

In terms of order dated 27/09/2017 passed by this Tribunal in the above mentioned case, it is ordered that the Applicant Certificate Holder Bank is entitled to recover a sum of Rs.66,31,579.00 with future interest @ 18.36p.a with Quarterly rests from 30.09.2008 till the date of realization in full, jointly and severally along with costs from the Certificate Debtors No.1 to 4 hereinafter referred to as:-

Certificate Debtor No.1 : M/s.Murugan Foundary
Private Limited.
Certificate Debtor No.2 : Mrs.Nachammai
Certificate Debtor No.3 : Mrs.P.R.Annamalai
Certificate Debtor No.4 : Mr.P.R.Senthilnathan

a) It is ordered that in case of default to pay the amount adjudged by the said defendants applicant bank is entitled to sell the mortgaged properties and hypothecated assets morefully described in Schedule A & Schedule B to answer the claim of the Recovery Certificate and appropriate the sale proceeds towards

the amount due.

b) If the sale proceeds are not found sufficient after defraying the expenses of such sale for the payment of all such amounts, the defendants 1 to 4 are personally liable for the deficiency of the adjudged amount with future interest at 18.36% p.a. with quarterly rests until realisation.

c) It is further ordered that any amount remitted by the defendants or realized by the applicant bank during the pendency of this OA, shall be given due credit to the respective loan account of the defendants.

The Recovery Officer shall realize the amount as per this Certificate in the manner and more prescribed under Section 25 and 28 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (as amended from time to time) from the above named Certificate Debtors.

Given under my hand and the seal of this Tribunal this day of 1st February, 2018.

(GANAPATHI KRK)
PRESIDING OFFICER

Annexure-I
DRC No.21/2018
in
ORIGINAL APPLICATION : 48/2009

AMOUNT OF DRC		
S.N o.	Particulars	Amount (in Rs.)
1	Amount Determined	66,31,579.00
2	Interest @ 18.36% p.a. (with Quarterly rests) on Rs.66,31,579.00 from 30/06/2008 to 27/09/2017	2,67,14,841. 70
3	Application Fee	69,005.00
4	Advocate Fee	30,000.00
5	Misc. Expenses	17,700.00
	Total	3,34,63,125. 70
	(Rupees Three Crore Thirty Four Lakh Sixty Three Thousand One Hundred Twenty Five and Paise Seventy Only)	

(GANAPATHI KRK)
PRESIDING OFFICER

SCHEDULE OF PROPERTY
'A' SCHEDULE

Item 1:-

All that part and parcel of Plot Nos.87, 88, and 89, at Mehta Nagar, measuring East to West on the Northern side 61 feet 6 inches, East to West on the Southern side 60 feet, North to South on the Eastern side 117 feet, North to South on the Western side 117 feet, admeasuring 2 grounds and 2328 sq.ft., comprised in S.No.990/1 at Madhavaram Village in ambathur Taluk and this property being bounded on the North by Plot No.86, South by 12 feet passage, East by Existing road and on the West by proposed 20 feet road and this property is coming within the Sub-Registration District of Sembium and Registration District of Chennai North.

Item II:-

All that part and parcel of land and building bearing Plot Nos.4 & 5, measuring 4800 sq.ft., comprised in S.No.95/2 at Mogappair Village in Ambathur Taluk and this property being bounded on the North by 20 feet common road, South by Plot bearing Nos.1 & 2, East by Plot bearing Plot No.3 and on the West by 40 feet Mogappair Road and this property is coming within the Sub-Registration District of Konnur and Registration District of Chennai North.

"B" SCHEDULE

1. All that goods, stocks, raw materials at factory premises No.81, Mogappair Road, Mannurpet, Chennai.
2. The Plants and Machineries installed at the factory premises No.81, Mogappair Road, Mannurpet, Chennai."

PRESIDING OFFICER.

5. Being aggrieved by the record of proceedings dated 27.09.2017 in OA No.48 of 2009 on the file of the Presiding Officer, Debts Recovery Tribunal-III, Chennai and the Debts Recovery Certificate No.21 of 2018 dated 01.02.2018 in O.A.No.48 of 2009, instant writ petition has been filed to quash the same.

6. Considering the manner in which the original application filed for recovery of Rs.66,31,579.30p was allowed, we ordered notice of motion to the respondent bank returnable by 19.06.2018.

7. When the writ petition came up for hearing on 19.06.2018, Mr.Murugavel, learned counsel for the bank submitted that though instant writ petition has been filed challenging the record of proceedings dated 27.09.2017 made in OA No.48 of 2009, before DRAT, Chennai, an interim application has also been filed to set aside the exparte proceedings in OA.No.48 of 2009 dated 27.09.2017 and therefore, learned counsel for respondent bank made preliminary objections, to the maintainability of the writ petition.

8. On the above objections / submissions, we directed the learned counsel for the respondent bank to substantiate the same with materials.

9. Reverting, by filing a typed set of papers dated 21.06.2018, Mr.B.Murugavel, learned counsel for the bank submitted that application filed to set aside the exparte order dated 27.09.2017, is still pending on the file of Debts Recovery Tribunal-III, Chennai and therefore, instant writ petition filed is not maintainable. He further submitted that when an application was filed by the petitioner before DRAT, Chennai, for transfer of OA No.48 of 2009 from the file of Debts Recovery Tribunal-III, Chennai to some other tribunal and during the course of hearing of the said transfer application, though a request to transfer the application filed to set aside the exparte order dated 27.09.2017, was also made, the appellate tribunal turned down the said request.

10. Inviting the attention of this Court to the material on record, orders passed by Debts Recovery Tribunal-III, Chennai in SA No.151 of 2007 dated 12.09.2012 and OA No.48 of 2009 dated 27.09.2017, Mr.R.Subramanian, learned counsel for the petitioners / borrowers submitted that when measures taken by the bank under Section 13(4) of the SARFAESI Act, 2002, has been set aside, there cannot be any further action by the bank, by invoking the provisions of the Recovery of Debts Due to Bank and Financial Institutions Act, 1993.

11. According to the learned counsel for the petitioner, decision inter se between the borrowers and bank rendered in S.A.No.151 of 2007, (initiated under the SARFAESI Act, 2002) would operate as res judicata in the subsequent action initiated by the bank under the Recovery of Debts Due to Bank and Financial Institutions Act, 1993. Attributing manipulation, fraud, suppression on the part of the bank, in initiating recovery proceedings, submission were also made. Attention of this Court was invited to few decision on the above aspect.

12. By way of reply, Mr.B.Murugavel, learned counsel for the bank submitted that Doctrine of res judicata, has no application to the case on hand. He further added that proceedings under

SARFAESI Act, 2002 and Recovery of Debts Due to Bank and Financial Institutions Act, 1993, are distinct and operate separately. For the abovesaid reasons, he prayed for dismissal of writ petition.

Heard the learned counsel for the parties and perused the materials available on record.

13. In SA No.151 of 2007, possession notice dated 10.08.2007, has been challenged. Upon hearing the parties, vide order dated 12.09.2012, Debts Recovery Tribunal-III, Chennai, set aside the possession notice.

14. In OA No.48 of 2009, bank has sought for recovery of Rs.66,31,579.30p and for other reliefs stated supra.

15. As stated supra, written submission was not filed within time. However, the tribunal permitted filing of the written submissions on payment of Rs.1,000/- to "Ramakrishna Mission Students' Home". Said condition has not been complied with. The defendants were not present. They were set exparte. Consequent to which, OA has been allowed in terms of the prayer sought for.

16. The fact remains that the petitioner has filed an application to set aside the exparte order dated 27.09.2017 and that the same is pending on the file of Debts Recovery Tribunal-III, Chennai. Material on record discloses that the petitioner has filed a transfer application before the DRAT, Chennai in MA No.186 of 2017 (T), to transfer OA No.48 of 2009 on the file of Debts Recovery Tribunal-III, Chennai to some other tribunal. However, when the transfer application came up for hearing, taking note of the fact that OA No.48 of 2009 filed by the bank for recovery was already allowed and by observing that transfer application had become infructuous, vide order dated 08.05.2018, DRAT, Chennai, dismissed the transfer application No.MA.No.186 of 2017(T). For brevity, order made in MA No.186 of 2017 (T) dated 08.02.2018, is extracted.

"ORDER

Ld. Counsel Mr.Senthilnathan for Appellant present.

Ld. Counsel Mr.Sam Arul Prasath for R1 present.

In view of the fact that OA 48/2009 has been allowed, hence transfer application seems infructuous.

Appellant counsel submits that application is pending before PO for setting aside the exparte

order, even that can be transferred to some other Tribunal.

In view of the fact that this is a subsequent event, hence transfer application stands dismissed as having been rendered infructuous with liberty to Appellant to file new transfer application for transfer of setting aside petition if advised so."

17. Thus, as rightly pointed out by Mr.B.Murugavel, learned counsel for the bank that the request to transfer miscellaneous application filed before Debts Recovery Tribunal-III, Chennai, for setting aside the exparte order dated 27.09.2017, to some other tribunal, has not been granted. Application filed to set aside the exparte order dated 27.09.2017 is still pending on the file of Debts Recovery Tribunal-III, Chennai. If for any reasons, the Debts Recovery Tribunal-III, Chennai decides to set aside the exparte order dated 27.09.2017 and restore OA No.48 of 2009, from the stage of filing of written submissions, consequently final order in OA No.48 of 2009 also would be set aside. As the application filed under Section 22(2) of the Recovery of Debts Due to Bank & Financial Institutions Act, 1993 is still pending on the file of Debts Recovery Tribunal-III, Chennai for restoration. Instant writ petition filed to set aside the order dated 27.09.2017 and consequently, the recovery certificate in DRC No.21 of 2018 dated 01.02.2018, is not maintainable. Merits of the proceedings cannot be permitted to be challenged in two different forums, in parallel proceedings.

18. Though rival contentions have been made on the aspect of res judicata, fraud and suppression and other issues, there is no need for this Court to advert to the above issues, at this stage, when application filed to set aside the exparte order, is pending before Debts Recovery Tribunal-III, Chennai.

19. While dismissing the writ petition filed, for the above said reasons, we direct the petitioners, to seek for early disposal of the application pending before the Debts Recovery Tribunal-III, Chennai for restoration or to file a fresh transfer application, as suggested by the appellate forum.

20. Writ petition is dismissed, accordingly. No costs. Consequently, the connected Writ Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

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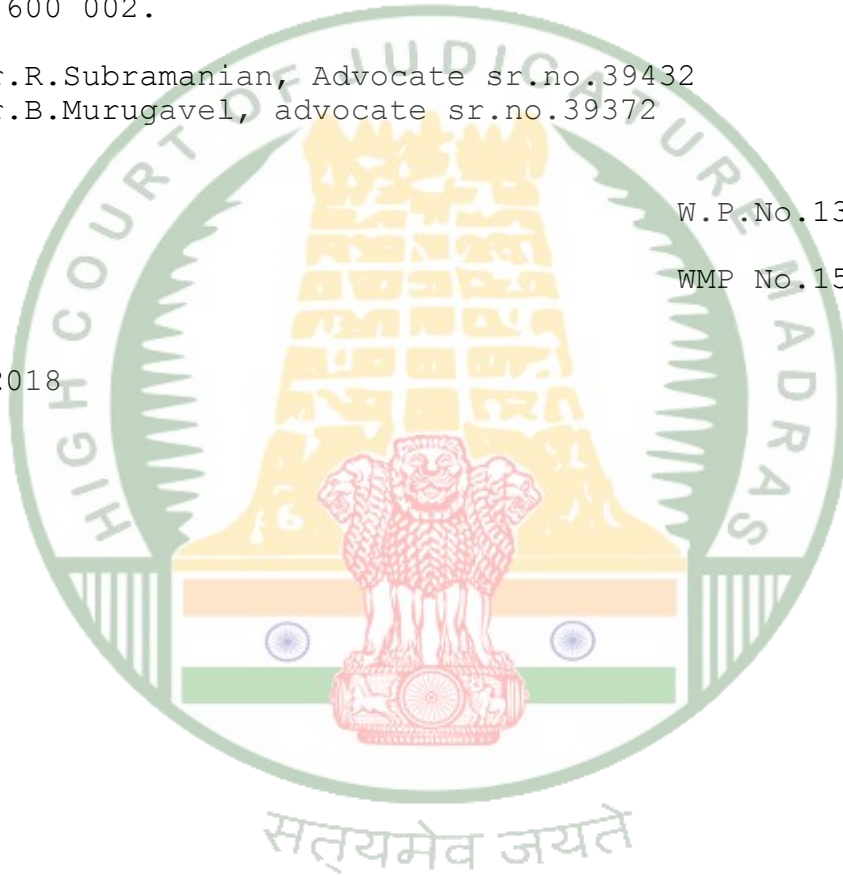
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+1cc to Mr.R.Subramanian, Advocate sr.no.39432
+1cc to Mr.B.Murugavel, advocate sr.no.39372

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